SUPREME COURT, U. S.

SUPPLEMENTAL APPENDIX TO BRIEFS FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Petitioner*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY, LAFAYETTE, LOUISIANA; AND STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA, *Respondents*.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Petitioner*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL APPENDIX

PREFACE TO APPENDIX

This appendix contains the Opinion of Frederick W. Lehmann, Solicitor General of the United States, dated November 6, 1911, which was concurred in by the Attorney General of the United States—same being taken from 75

Cong. Rec. 9899 (May 10, 1932), as it was inserted in the Record by Senator Carter Glass, Chairman of the Senate Banking and Currency Committee. Also included herein are excerpts from the Order and Opinion of May 6, 1963, of the Board of Governors of the Federal Reserve System in *Application of Trans-Nebraska Co.*, wherein the Board itself, after the decision of the District Court in this action, applied a State Baik Holding Company Act to deny an application similar to the one involved in the case at bar.

APPENDIX C

[Senate Document No. 92, Seventy-second Congress, first session]

LEGALITY OF CERTAIN AGREEMENTS CONCERNING HOLDINGS OF NATIONAL-BANK STOCK

Mr. GLASS presented the following opinion of Solicitor General Lehmann submitted to the Attorney General on November 6, 1911, relative to the legality of certain agreements and arrangements as to holdings of national-bank stocks:

DEPARTMENT OF JUSTICE,
Washington, D. C., November 6, 1911.

The ATTORNEY GENERAL.

SIR: You advise me that the President desires that there shall be submitted to him upon his return to Washington a fuller discussion of the question of the legality of the agreements and arrangements existing between the ———— ———— Bank of New York and the ———— ———— Co., a corporation of the State of New York.

On August 1, 1911, I submitted to you an opinion, in which you concurred, that the agreements and arrangements in question were means of enabling the bank to carry on business and exercise powers prohibited to it by the national banking act.

I have reconsidered the question with the care demanded by its importance, and have reached the conclusion that both the bank and the company, whether considered as affiliated or as unrelated, are in violation of the law.

At the outset it is well to consider the purposes which the framers of the national banking act had in view. The first, the paramount, purpose was to secure a uniform national system of currency, and to do this without the creation of a great central institution like the old United States Bank.

The opposition to such an institution was deep-seated and widespread, and the sponsors of the various plans which took final shape in the national banking act were careful to point out that the objections to the United States Bank had been duly considered and had been avoided by them.

In August, 1861, O. B. Potter, of New York, submitted to the Secretary of the Treasury a scheme to permit State banks and bankers to issue notes secured by United States bonds, saying: "*None of the objections justly urged against a United States bank lie against this plan.* It gives to the Government no power to bestow favors and does not place a dollar in its hands to lend: * * * It is impossible to see how such system can be made use of for political ends." (The Origin of the National Banking System, S. Doc. No. 582, pp. 46-48, 61st Cong., 2d sess.)

Samuel Hooper, a Member of the House from Massachusetts, was an active agent in the attainment of the end sought. In support of one of the early measures proposed, which, while it did not become a law, was a step in that direction, he said:

"*Thus are secured all the benefits of the old United States Bank without many of those objectionable features which aroused opposition.* It was affirmed that, by its favors, the Government enabled that bank to monopolize the business of the country. Here no such system of favoritism exists. * * * It was affirmed that frequently great inconvenience and sometimes terrible disaster resulted to the trade and commerce of different localities by the mother bank of the United States arbitrarily interfering with the management of the branches by reducing suddenly their loans and sometimes withdrawing large amounts of their specie for political effect. Here each bank transacts its own business upon its own capital, and is subject to no demands except those of its own customers and its own business. It will be as if the Bank of the United States had been divided into many parts, and each part endowed

with the life, motion, and similitude of the whole, revolving on its own orbit, managed by its own board of directors, attending to the business interests of its own locality; and yet to the bills of each will be given as wide a circulation and as fixed a value as were given to those of the Bank of the United States in its palmiest days." (Congressional Globe, 37th Cong., 2d sess., Pt. I, p. 616.)

In the national banking act as passed in 1863 it was believed that the desired result had been obtained.

Mr. Hugh McCulloch, president of a leading bank at Indianapolis, and distinguished as a financier, was induced, at great sacrifice to himself, to accept the office of Comptroller of the Currency and inaugurate the new system. In a letter to a friend published in the Banker's Magazine, Vol. XVIII, pages 8 and 9, he said:

"The national system of banking has been devised with a wisdom that reflects the highest credit upon its author to furnish to the people of the United States a *national-bank note circulation without the agency of a national bank.* It is not to be a mammoth corporation, with power to increase and diminish its discounts and circulation, at the will of its managers, thus enabling a board of directors to control the business and politics of the country. It can have no concentrated political power. Nor do I see how it can be diverted from its proper and legitimate objects for partisan purposes. It will concentrate in the hands of no privileged persons a monopoly of banking. It simply authorizes, under suitable and necessary restrictions, any number of persons, not less than five in number, in any of the States or Territories of the Union, to engage in the business of banking, while it prevents them from issuing a single dollar to circulate as money which is not secured by the stocks and resources of the Government. It is, therefore, in my judgment (as far as calculation is regarded), not only a perfectly safe system of banking, but it is one that is eminently adapted to the nature of our political institutions."

In his first report as Comptroller of Currency, made November 28, 1863, he says:

"By the national currency act the principle is for the first time recognized and established that the redemption of bank notes should be guaranteed by the Government authorizing their issue. The national currency will be as solvent as the nation of which it represents the unity. The country has at last secured to it *a permanent paper circulating medium of a uniform value, without the aid of a national bank.* This national system confers no monopoly of banking, but opens its advantages equally to all. It interferes with no State rights. It meets both the necessities of the Government and the wants of the people. It needs modifications, and may require others than those which are suggested in this report; but it is right in principle, and of its success there can, I think, be no reasonable doubt.

"This examination of the act, and the observation of the manner in which it is being administered, have resulted in the entering up of a popular judgment in favor of the national-banking system: A judgment, not that the system is a perfect one, nor free from danger of abuse, but that it is a safer system, better adapted to the nature of our political institutions; and to our commercial necessities, giving more strength to the Government, with less risk of its being used by the Government against the just rights of the States, or the rights of the people, than any system which has yet been devised, and that by such amendments of the act as experience may show to be needful, it may be made as little objectionable and as beneficial to the Government and the people as any paper-money banking system that wisdom and experience are likely to invent. It promises to give to the people that long-existing 'desideratum,' *a national currency without a national bank,* a bank-note circulation of uniform value without the creation of a moneyed power in a few hands over the politics and business of the country."

And again in his second report, made November 25, 1864.

When in his letter and reports Mr. McCulloch speaks of "a national bank-note circulation *without the agency of a national bank*," etc., he manifestly has reference to an institution national in the sense of being a central institution like the old United States Bank, operating throughout the country by means of branches.

The banks created by the national banking act were, and were designed to be, local institutions and independent of each other, but under national control and supervision. Nationalization without centralization was the keynote of the law. This is demonstrated by the structure of the banks provided for.

Reference will be made to the national banking act as contained in the United States Compiled Statutes, 1901. It is title 62, and consists of four chapters. The first chapter deals with "organization and powers," the second with "obtaining and issuing circulating notes," the third with "regulation of the banking business," and the fourth with "dissolution and receivership." The entire act is too long for reproduction here, but pertinent sections will be set out in full or in their substance.

Section 5133, "formation of national banking associations," provides:

"Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

It should be noted in passing that only "natural persons" may engage in the formation of a bank.

Section 5134, "requisites of organization certificate," provides:

"The persons uniting to form such an association shall, under their hands, make an organization in certificate, which shall specifically state:

"First. The name assumed by such association, which name shall be subject to the approval of the Comptroller of the Currency.

"Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town or village.

"Third. The amount of capital stock and the number of shares into which the same is to be divided.

"Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

"Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title,"

By this section the bank is distinctly localized, for it requires that "the place where its operations of discount and deposits are to be carried on" shall be designated as to State, county and city, town or village, and it allows but one place.

This is repeated in section 5190, "place of business," which provides:

"The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

By an act of May 1, 1886 (ch. 73, 24 Stat. 18), a bank was authorized to *change* its location, but not to a place more than 30 miles distant, and the new location must be within the same State. No provision has ever been made for

increasing the number of cities, towns, or villages in which a bank may do business.

Section 5138, "requisite amount of capital," provides:

"No association shall be organized with a less capital than $100,000, except that banks with a capital of not less than $50,000 may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed 6,000 inhabitants, and except that banks with a capital of not less than $25,000 may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed 3,000 inhabitants. No association shall be organized in a city the population of which exceeds 50,000 persons with a capital of less than $200,000."

This, because of the small amount of capital required in such case, extends the facitities of national banking to the smallest communities.

Section 5146, "requisite qualifications of directors," provides:

"Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance of office. Every director must own, in his own right, at least 10 shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of 10 shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

Here the local character of the bank is secured. The directors must all be shareholders, they must all be citizens of the United States and three-fourths of them must be residents of the State.

The powers of the bank are conferred in general terms by section 5136, and they are, to have a seal, and perpetual succession, to make contracts, sue and be sued, elect officers and define their duties, and further—

"Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence this business of banking."

Section 5137 confers power to hold real property and limits it to such as may be necessary for "its immediate accommodation in the transaction of its business," and such as it may acquire in the way of securing payment of debts previously contracted, but real estate so acquired can not be held for a longer period than five years.

Section 5197 limits the rate of interest which may be taken to that "allowed by the laws of the State, Territory, or District where the bank is located."

This again emphasizes the local character of the institution.

Section 5201 prohibits a bank from loaning upon or purchasing its own shares.

It has been repeatedly held that the powers of a national bank are limited to those expressly granted by the act and such as are properly incidental to those granted.

In Logan County National Bank *v.* Townsend (139 U. S. 67, 1. c. 75), the court, speaking through Mr. Justice Harlan, said:

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act, for all associations organized under it, *and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established.* The statute declares that a national banking institution shall have power 'to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions' of title 62 of the Revised Statutes."

And in California Bank *v.* Kennedy (167 U. S. 362, 1. c. 366) the court, through Mr. Justice White, said:

"*It it settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established.* Logan County Bank *v.* Townsend (139 U. S. 67, 73). No express power to acquire the stock of another corporation is conferred upon a national bank; but it has been held that, as incidental to the power to

loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. National Bank *v.* Case (99 U. S. 628). So, also, a national bank may be conceded to possess the incidental power to accept in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank *v.* National Exchange Bank (92 U. S. 122, 128)."

The proposition is an elementary one in corporation law and needs no elaboration.

It follows that while a bank may take the stocks of another corporation as collateral to a loan, or take them in payment of a debt previously incurred, it can not deal in stocks. The limit of its powers in this respect is stated by Chief Justice White in First National Bank *v.* National Exchange Bank (92 U.S. 122, 128):

" • • • In the honest exercise of the power to compromise a doubtful debt owing to a bank it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce in anticipated loss. *Such a transaction would not amount to a dealing in stocks.*"

In First National Bank *v.* Converse (200 U.S. 425) a manufacturing company had failed, and the creditors, among whom was the bank, organized a new corporation to purchase the stocks, evidences of debt, and assets of the old, and to continue in the manufacture of the same articles that had been manufactured by the old company. This transaction was held to be without the powers of the bank. The court, page 439, said:

"• • • To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a preexisting debt *does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held can not be done.*"

As to acquiring the stocks of other national banks, the ruling of the court is very explicit.

In Concord First National Bank *v.* Hawkins (174 U.S. 364) the bank of Concord, N. H., had bought and held as an investment 100 shares of the stock of the Indianapolis National Bank. The last-named bank failed and Hawkins as receiver sued the Concord bank to recover the assessment which had been made upon the stock of the Indianapolis bank. The Concord bank denied liability upon the grounds that it had no right to hold the stock. The court refused to so much as to apply the doctrine of estoppel in favor of creditors. Referring to previous decisions of the court and to the distinction made by the circuit court between the acquisition of stocks in national banks and of stocks in other corporations, the court, page 368, said:

"No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. *The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant States, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful.* Thus, it is enacted, in section 5146, that "every director must, during his whole term of service, be a citizen

of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office."

"One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by directors of their own selection but by distant and unknown persons. *Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that in that way the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks in such a case would be in fact though not in form branches of the larger one.*

"Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms:

" 'No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a

debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the association.'

"This provision forbidding a national bank to own and hold shares of its own capital stock would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another."

Here is an express recognition and assertion of the local and independent character of our national banks and the denial of any power which would tend to create what is in effect a central bank with branches.

As to the transfer of its shares, a national bank has power only "to prescribe, by its board of directors, by-laws not inconsistent with law, *regulating the manner* in which its stock shall be transferred." Manner relates to method or form and not to substance. So the by-laws may require a formal indorsement of the outstanding certificate, the issuance of a new one, and a register of the transfer upon the books of the bank. But no condition can be imposed which limits or impairs the right of transfer.

The national banking act, as orginally passed in 1863, by section 36, denied to the stockholder "power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remains unpaid," etc.; but this provision was repealed by the act of 1864, which, with amendments, is the act now upon the books. The purpose of the repeal was to make the shares more readily transferable. Banks thereafter, however, attempted to enforce the restrictions of the original act by means of by-laws, but these have been held always to be invalid. Speaking to this subject in Bank *v.* Lanier, 11 Wall. 369, 1. c. 377-378, the court said:

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on ban[illegible] asso-

ciations. Without this power it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

"It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as particable. If we assume that the certificates in question are not different from those in general use by corporations—and the assumption is a safe one—it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificates."

This ruling holding the restrictive by-law to be invalid was repeated in Bullard *v.* National Eagle Bank (18 Wall. 594), Third National Bank *v.* Buffalo German Ins. Co. (193 U. S. 581), and in many cases on the circuit and in the State courts.

If the law was changed to permit a transfer, when to deny it was in the immediate interest of the bank, it surely never was the purpose to authorize a restriction upon transfer in behalf of any interest foreign to the bank, and with which it is forbidden that the bank, as a bank, may be identified.

From the history of the national banking act, from its terms and provisions, and from the decisions of the Supreme Court construing it, these propositions are derived:

I. The banks are local institutions and independent of each other, none the less that they are creatures of Federal power and subject to Federal supervision and control.

II. A bank may in its by-laws regulate the manner in which its shares may be transferred, but it can not impair or limit the right of transfer.

III. As to business operations, the bank has such powers as are expressly granted by the act and such as are properly incidental to those expressly granted, and none other, and so can engage only in the business of banking as that business is defined by the act.

IV. It is neither banking nor an incident of banking to invest the funds of the bank in another business in any manner or to any extent; and the bank has, therefore, no right to invest its funds in the stocks of another corporation, and especially not in the stocks of another national bank.

V. The powers of a national banking association are and can be granted only by the United States, and as no grant of such powers is made by the act to any State corporation they may not be exercised by such a corporation.

These propositions relate to matters of substance, and so may be no more evaded than violated. Indirection, if it accomplishes the same purpose, stands upon the same footing with direction.

Coming now to the case in hand, we have to consider what is the practical effect of the creation of the ——— ——— Bank and its affiliation with the ——— ——— Company.

So far as concerns matters of form, it may be conceded that the ——— ——— Bank was incorporated as an independent institution. Still its certificate of incorporation while not compelling dependence upon or interrelation with any other institution does provide for it. Its business powers and capacities are very extensive. They authorize the acquisition of any kind of property and the conduct of any kind of business and the doing of whatever may be incident thereto. (See art. 2 of the certificate of association). The only limitation upon its business activities is to be found in Paragraph VIII of Article II, and this is:

"• • • but nothing herein contained shall be construed as authorizing the business of banking nor as including the business purpose or purposes of a money corporation or a corporation provided for by the banking, insurance, railroad, and the transportation corporations laws, or an educational institution or corporation which maybe incorporated as provided in the education law, nor as authorizing or intending to authorize the performance at any time of any act or acts then unlawful."

As the business of banking, which must be taken to include the business of banking under the national banking laws, is expressly prohibited, the powers of the company *as granted by its charter* do not offend the Federal laws.

The tenth article provides in its first paragraph that "the directors of the company need not be stockholders," and in the second paragraph that—

"No transaction entered into by the company shall be affected by the fact that the directors of the company were personally interested in it, and every director of the company is hereby relieved from any disability that might

otherwise prevent his contracting with the company for the benefit of himself or any firm, association, or corporation in which he may be in anywise interested."

These provisions in and of themselves violate no Federal statutes, but they give a facility for serving two masters, which is, to say the least, unusual; and they do permit the use of the company as a mere instrumentality or convenience of some other institution.

The capital stock of the company is by the third article fixed at $10,000,000, but it is provided by paragraph 5 of article 10 that—

"The board of directors shall have absolute discretion in the declaration of dividends out of the surplus profits of the company, and they may accumulate such profits to such extent as they may deem advisable instead of distributing them among the stockholders, and may invest and reinvest the same in such manner as in their absolute discretion they may deem advisable."

Thus, while there is a limit placed upon the capital stock of the company, there is none upon the actual capital it may accumulate, and so none upon its possible financial power.

These various provisions of the certificate of incorporation are important to be considered in view of the use which has been made of the company.

The certificate is dated July 5, 1911, but prior to that date on June 1, 1911, an agreement was entered into between the ———— ———— Bank as the first party [three names of prominent persons eliminated] trustees, as the second party, and [five names of prominent persons eliminated] and other subscribers, "who are shareholders of the said bank," as parties of the third part. In the agreement these parties are designated, respectfully, as "the bank," "the trustees," and "the subscribers."

The trustees are all of them officers of the bank. Mr. ———— is the chairman of the board of directors, Mr. ———— is its president, and Mr. ———— is a director. The agreement, then, is one between the bank, its officers and its shareholders, and, as will be seen, the officers and shareholders are dealt with not as individuals but as officers and shareholders.

The preamble recites that—

"Opportunities and facilities for making desirable investments, *other than those which are possible in the ordinary course of the banking business*, are, from time to time presented to the officers of the bank, which they desire to make available to the shareholders of the bank."

Here is the declared purpose to do something, make investments, not within the scope of the bank's powers. That the officers and shareholders of the bank as individuals may make such investments is conceded, but that the bank, or its officers or shareholders, as officers and shareholders, may do so; in other words, that the powers and facilities granted by the national banking act may be used for purposes outside the ordinary course of banking business is denied.

The first article of the agreement provides for the organization of an investing company. It is here called the United States Investing Co. It is, however, the ———— ———— Company under a provisional name.

It is not within the scope of the bank's powers to have part or lot in such an agreement, for the simple reason that the formation of an investing company, under State corporation laws, is not the conduct of banking under national laws. And what is true of the bank is true of its officers and shareholders acting as such.

The second article accords to each shareholder of the bank, as a right, a beneficial interest, through the trustees, in the capital stock of the investing company, to the

extent of two-fifths of the par value of his capital stock in the bank, provided he exercises his right by executing the agreement or by having his bank stock stamped as thereafter provided in the agreement. If the shareholder does not exercise his right in time, the trustees may determine the conditions upon which he may do so thereafter.

The par value of the capital stock of the bank is $25,000,000, and two-fifths of this is ten millions, which is the par value of the stock of the investing company. Every shareholder of the bank exercising his right, the stock of the company is fully provided for.

It is contended that the shareholder of the bank is not required to take his allotted beneficial interest in the company, but manifestly, he is under strong compulsion. The bank and the company, as will be seen from later provisions of the agreement, are so closely bound together that the welfare of the company will always be the serious concern of the bank. For better or for worse the bank and the company are united. The shareholder, if he is not in the arrangement, must none the less hazard the worse and get none of the better, and so, inasmuch as against his will he is in for the worse, he will in self-protection go in further and entitle himself to the better.

The third article provides that in order to facilitate participation by the shareholders of the bank in the beneficial interests in the company, the trustees will recommend to the directors of the bank the declaration of a special dividend of 40 per cent on the capital stock of the bank, which will amount to $10,000,000, or the exact amount of the capital stock of the company. The subscribers, shareholders of the bank, agree to apply the dividend to the payment of the stock of the company.

The recommendation of the trustees, officers of the bank, assented to by the bank and by two-thirds of the shareholders, was sure to be adopted, but not even as against a dissenting or nonassenting minority, no matter how small

that minority might be, was there a right to declare a dividend except as such declaration was made in the interest of the bank and its shareholders as such. And there is a larger interest, that of depositors and of the National Government, which requires that the bank shall be conducted as a bank pure and simple and not as a promoting agency of speculative investment companies.

The fourth article requires that the subscribers at once assign the special dividend to the trustees in order to enable the trustees to organize the investing company.

This only emphasizes the fact that the resources and facilities of the bank were utilized to create the investing company.

The fifth article provides (1) that the stock of the investing company shall be issued to the trustees and shall be held by them and their successors in trust, and (2) that the beneficial interest of the subscribers in this stock "shall not be transferable separately, but only by the transfer of the shares of stock of the bank held by them, respectively, and every sale or transfer of stock of the bank by a subscriber or his successor shall include the beneficial interest of such subscriber or his successor in the capital stock of the investing company attaching to the shares of the bank so sold or transferred."

The first clause of this article limits the number of stockholders in the company to three, the three being the trustees and their successors in trust.

Article 9 of the agreement provides:

"The number of trustees hereunder shall not be less than three. Any trustee may, at any time, resign. In case of any vacancy in the number of trustees, it shall be filled by the remaining trustees by the selection of some one who is an officer or a director of the bank: And any trustee who shall cease to be an officer or a director of the bank shall thereupon also cease to be a trustee hereunder; *it being*

intended that only officers or directors of the bank shall act as trustees.

"No trustee shall be liable for the acts of any other trustee, but shall be liable only for his own willful misconduct.

"The trustees may act by a majority, either at a meeting or by writing with or without a meeting; and they may vote in person or by proxy."

Thus only officers or directors of the bank can ever be stockholders in the company, for the trustees hold the stock and only officers and directors of the bank can be trustees. And the trustees are a self-perpetuating body. Any vacancy is to be filled by the remaining trustees.

By article 8 it is provided that the trustees and such other persons as they may designate, who shall be officers or directors of the bank, shall constitute the first board of directors of the company, and that no one shall ever be a director of the company who is not also an officer or director of the bank.

The certificate of incorporation of the company provides for five directors, but it has only three stockholders; therefore it was provided in the certificate that directors need not be stockholders.

The second clause of article 5 prohibits transfer of beneficial interests in the company without a transfer of the corresponding shares of the bank, and, conversely, prohibits transfer of shares in the bank without a transfer of the corresponding beneficial interest in the company.

Article 6 provides for certain indorsements upon the certificate of bank shares and upon the certificates of beneficial interest in the company. These indorsements are in aid of the plan and purpose of the agreement.

Article 7 requires payment of company dividends to be made to shareholders of the bank whose certificates of bank shares are stamped or indorsed as provided in article

5. Payments of these dividends may be made by the trustees to the bank, and such payment will relieve the trustees from further liability on their account.

Article 10 provides for the amendment, modification, or termination of the agreement. Any of these can be accomplished only "with the written consent of the trustees and of two-thirds in interest of those for whom the capital stock of the investing company is then held by the trustees."

This, then, is the situation: The company was not independently organized, but was organized by the bank, its officers and shareholders, acting as such. Only shareholders of the bank were permitted an interest in the company and these only in the proportion of their holdings in the bank. This constitution of the interests of the company must continue to the end, for no one can ever come into the company without coming into the bank, and no one can ever go out of the company without going out of the bank. The bank, by declaration of a dividend, furnished the entire capital of the company. No person can be an officer or director of the company unless he is an officer or director of the bank.

This is not all. The company has no independence of action. It has no control or authority over its own affairs. It is to be remembered that all its stock is to be held by the trustees, and of course, is to be voted by them. Plenary power over the company is therefore held by these trustees. Now, these trustees were not elected by the incorporators of the company nor by its stockholders. They were nominated by the agreement between the bank, its officers and shareholders, made before the company was in existence. They can not be removed, nor can their successors be elected or determined by any power or interest of the company. The trustees, nominated by the agreement, perpetuate themselves. They appoint their own successors. The only power outside themselves which can make a change in their membership is the shareholding body of the bank. The shareholders by not continuing a trustee as an officer or

director of the bank eliminate him as a trustee. The official organization of the company and the vesting of its powers are determined and can be determined only by the corporate action of the bank.

And the agreement which accomplishes all these things is beyond the scope of the legitimate action of the bank to change or terminate. Two-thirds of the shareholders of the bank and the trustees must agree before there can be a change in it or an end of it. In this matter, so material to the welfare of the bank, the shareholders and the directors have abdicated their powers and duties and abandoned them to a minority of their number and the three trustees.

To facilitate the conduct of the business of the company by the officers of the bank, article 10 of the certificate of incorporation of the company provides that no transaction entered into by the company shall be affected by the fact that its officers or directors are contracting for their own benefit, or for the benefit of any firm, association, or corporation in which they may be interested in any wise.

This arrangement between the bank and the company virtually consolidates them, unifies their every interest, and requires that all the powers and capacities of both shall always be exerted in unison—or it does not.

If we have two institutions, and not one, chartered as each one of them is by public authority, and by different sovereignties, then each has its own peculiar mission and its own distinctive rights and duties, powers, and obligations. The bank is not concerned with the company, except as it might be with any other possible borrower of its funds, and the company is not concerned with the bank, except as it might be with any other institution whose funds it might wish to borrow. The band will not be influenced to lend money in aid of any enterprise in which the company may be engaged, because of that fact, and the company will not, because of its relations with the bank, look to it the more readily for financial support. The business of

each will be conducted with regard to its own distinctive advantage.

If these institutions are twain in the substantial sense indicated, then the arrangement which places the control of the company so absolutely and irrevocably under trustees appointed by the bank, and subject to change only by the corporate action of the bank, offends the fundamental law that "no servant can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other." This law is implied in every line of the charter of the bank, and the attempt to repeal it in the tenth article of incorporation of the company is vain and nugatory.

If, however, the mission of the bank and the mission of the company are alike and linked always in interest and welfare, if the rights and duties of the two are necessarily harmonious and reciprocal, if the bank at all times must cooperate with the company and the company with the bank, if the officers and directors of the bank who are also the officers and directors of the company can not come into the predicament of divided allegiance, and, indeed, are in the service of but one master, then the bank involved is engaged, participating in, and conducting the business of the company, business beyond its chartered powers, business that is not national banking.

Only the absolute unity and identity of interest between the two institutions would afford moral excuse for the fusion of their powers under one control, but that excuse can not justify transgression of the positive mandate of the national banking act, which, from considerations of public interest, has determined that national banking shall be a business apart to be conducted by institutions organized for that purpose and for no other.

I am constrained to conclude that as to the bank the agreement violates the law, in its details, because it impairs and limits the right of transfer of shares and because it assumes to bind the bank beyond the possibility of re-

lease by the majority action of its shareholders and directors, and its general plan and scope, because it embarks the bank in business and ventures beyond its corporate powers.

The operations under this agreement are proper to be considered, and what is said in this connection is based upon a letter of date July 26, 1911, from President ———— to United States Attorney ————.

At that date $9,679,000 of the capital stock of the company had been paid up, showing that more than 96 per cent of the shareholders of the bank had come into the arrangement.

The company had made investments in the shares of 16 different banks and trust companies, the aggregate number of shares being 29,178. The market value of these was not shown. In addition, approximately $3,200,000 had been invested in other companies of different character.

Of the banks, nine were national banks. The number of shares held by the company and the total number of shares of the capital stock of the banks is as follows:

Bank	Company's holdings	Total number of shares of capital stock of bank
Second National Bank of New York	10	10,000
Fletcher American National Bank of Indianapolis	167	20,000
American National Bank of Indianapolis[1]	250	...
Fourth Street National Bank of Philadelphia	500	30,000
National Shawmut Bank of Boston	1,000	35,000
Riggs National Bank of Washington	2,240	10,000
National Butchers and Drovers Bank of New York	3,000	3,000
Lincoln National Bank of New York	4,324	10,000
National Bank of Commerce of New York	9,800	250,000

[1]No such bank shown in the American Bank Reporter.

Thus the company holds the entire capital stock of the National Butchers and Drovers Bank, not even deducting the shares, 10 each, which its nine directors are by the law required to hold in their own right. This bank surely is not independent of the ———— ———— Bank, in view of the relations of each to the company.

The company wants but 677 shares to hold a majority of the capital stock of the ———— ———— ————, and practically it may be said that when 4,324 out of 10,000 shares are held in one ownership, the control of the corporation has been secured.

If the ———— ———— Bank may extend its powers to the control of two other national banks, there is no limit to what it may do in that way. If the power exists, there is no restraint upon its exercise. By different methods and under other forms the ———— ———— Bank is doing, and in larger measure, what the Supreme Court in Concord First National Bank *v.* Hawkins, supra, declared to be in contravention of the national banking act.

And the ———— ———— Co., considered by itself and apart from its relations to the ———— ———— Bank, is also in violation of law. Its charter from the State of New York expressly prohibits it from the business of banking. And that charter could not confer the power to engage in the business of national banking. Such power could be conferred only by the laws of the United States.

Section 5133, quoted above, confers the power to form a national banking association only upon "natural persons." Other sections of the law restrict the place of operations of the association to a single city, town, or village, and require that its directors shall be natural persons, all of whom have a substantial interest in the bank and three-fourths of whom must be citizens, and residents of the State in which the association operates. Then, too, as we have seen, the bank may not as an investment acquire the shares of another bank, or, indeed, of any other corporation. The

purpose and result are that each national bank must be a local, independent institution, managed by natural persons, and not linked by proprietary interest with any other business than that of national banking.

It is not necessary to consider whether the national banking act absolutely prohibits the holding of shares in a national bank by a State corporation to any extent or for any purpose, and it may be conceded that a State corporation may acquire such shares as an incident to securing payment of a debt and hold them to a convenient time for sale, or that an institution like a trust company may hold them in a fiduciary capacity, but certainly there can be no holding of such shares by any corporation when the result is to defeat the policy of the national banking act; that is, to destroy the local character of the bank, break down its independence, vest its control in another corporation, and link it in substantial proprietary interest with some other business than national banking.

The ———— ———— Company may embark in almost any business whatever, and in fact has made large investments in other enterprises than banking. It has acquired ownership of all the stock of the National Butchers and Drovers Bank, a virtually controlling interest in the Lincoln National Bank, and interests of magnitude in other national banks.

The ownership of property implies duties as well as rights. As the company owns all the shares of the Butchers and Drovers Bank it has a duty with respect to them. It must vote them at shareholders' meetings, it must elect the directors of the bank, and decide important questions of policy. If this is not conducting the business of a national bank, how shall it be characterized?

In Anglo-American Land Co. *v.* Lombard (122 Fed. Rep. 721, l. c. 736) the Court of Appeals for the Eight Circuit, in an opinion by Van Devanter, J., now a Justice of the Supreme Court, held that the acquisition by a Missouri

company of the stock, and control of a Kansas company was illegal. He said:

"* * * Where it is not otherwise provided, the implication in a grant of corporate power and life is that the corporation shall exercise its powers and carry on its business through its own officers and employees, and not indirectly, through another corporation operated under its control, *and that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its powers to another corporation.* Conceding that a corporation of a private character, not charged with any public duties, may, in pursuance of appropriate action on the part of its stockholders, sell all of its property, wind up its affairs, and permanently retire from business, still, *in the absence of express authorization, neither the corporation nor its stockholders can, incidental to the sale of its property or otherwise, clothe another corporation with the right to maintain the corporate life or exercise the corporate powers.* These views are sustained, and the reasons therefor are fully set forth in De La Vergne Co. *v.* German Savings Institution (175 U. S. 40, 54, 20 Sup. Ct. 20, 44 L. Ed. 66), Buckeye Marble & Freestone Co. *v.* Harvey (Tenn.), (20 S. W. 427; 18 L. R. A. 252; 36 Am. St. Rep. 71), Easum *v.* Buckeye Brewing Co. (C. C.), (51 Fed. 156), and in the cases there cited."

We are dealing with corporations of a public character, with national banks, which have public duties to perform, and of these it is a peculiar obligation "to maintain independent corporate existence and not surrender control of their affairs or the exercise of their powers to another corporation."

No authority is given by the Federal statutes to the National Banking Association for assigning their powers and delegating their duties to a corporation created by a State, and which, under its charter from the State, may engage in a business and exercise powers denied to the banking association by the law of its creation.

Here again it is to be observed that if the power in question exists, it exists without limit. The company may extend its power to the full control of all the banks into which it has made entrance. Nor need it stop with these. As it grows by what it feeds upon it may expand into a great central bank, with branches in every section of the country. It is in incipient stage, a holding company of banks, with added power to hold whatever else it may find to be to its advantage.

Where public law and public policy are involved, forms and fictions are disregarded and the facts are dealt with as facts. In the Northern Securities case (193 U. S. 197) the securities company had acquired the majority of the shares of two great competing railway companies, and this was dealt with in effect as a consolidation of the railway companies. Harlan, judge, affirming the decree of the circuit court, said (p. 326):

"The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders for the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily, by this combination or arrangement, the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combina-

tion under which competition between the constituent companies would cease."

So in the *Standard Oil Case* (221 U.S.) and in the *Tobacco Case* (221 U. S. 106) the holding of stocks by the principal companies in the various subsidiary companies was recognized and dealt with as engaging in, directing, and controlling the business of the subsidiary companies.

Here the ———— ———— Company is not simply to control banks, but it may engage in any business whatever, even that forbidden by its charter, if, despite its charter prohibition as to certain kinds of business, it may invest in the stocks of companies conducting such business. The other enterprises in which the company is engaged may stand in need of credit and of funds, and it is too much to expect that the company's banks will deal simply as banks, equitably and impartially as between its own subsidiaries and persons and corporations with whom it is not affiliated. The temptation to the speculative use of the funds of the banks at opportune times will prove to be irresistible. Examples are recent and significant of the peril to a bank incident to the dual and diverse interests of its officers and directors. If many enterprises and many banks are brought and bound together in the nexus of a great holding corporation, the failure of one may involve all in a common disaster. And if the plan should prosper it would mean a union of power in the same hands over industry, commerce, and finance, with a resulting power over public affairs, which was the gravamen of objection to the United States Bank.

I conclude the ———— ———— Company in its holdings of national-bank stocks is in usurpation of Federal authortiy and in violation of Federal law.

Respectfully submitted.

FREDERICK W. LEHMANN,
Solicitor General.

APPENDIX D

FEDERAL RESERVE

press release

For immediate release May 6, 1963.

The Board of Governors of the Federal Reserve System today announced its denial of the application of Trans-Nebraska Co., Lincoln, Nebraska, for permission to become a bank holding company by acquiring over 50 per cent of the outstanding common stock of The Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

Attached are copies of the Order and Statement of the Board.

Attachments

UNITED STATES OF AMERICA

BEFORE THE BOARD OF GOVERNORS OF THE

FEDERAL RESERVE SYSTEM

WASHINGTON, D. C.

Docket No. BHC-66

In the Matter of the Application of

TRANS-NEBRASKA Co., Lincoln, Nebraska

for permission to became a bank holding company

Order Denying Application Under Bank Holding Company Act

There has come before the Board of Governors, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842) and section 222.4(a)(1) of Federal Reserve Regulation Y (12 CFR 222.4(a)(1)), an application on behalf of Trans-Nebraska Co., Lincoln, Nebraska, for permission to become a bank holding company by ac-

quiring over 50 per cent of the outstanding common stock of the Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

As required by section 3(b) of the said Act, the Board gave notice of receipt of the application to the Comptroller of the Currency and to the Director of Banking of the State of Nebraska, soliciting their views. *The Comptroller submitted a recommendation, dated July 3, 1962, that the application be approved.* The State Director of Banking also recommended, by letter of June 11, 1962, that the application be approved; *however, by letter of September 26, 1962, he informed the Board that a poll of bankers in the State by the Nebraska Bankers Association indicated substantial opposition to bank holding companies and that, had he known this at the time of his letter of June 11, he would not have recommended approval of the application.*

Notice of receipt of the application was published in the Federal Register on May 18, 1962 (27 F. R. 4748), affording opportunity for submission of comments and views regarding the proposed transaction. Thereafter, a public hearing, ordered by the Board pursuant to section 222.7(a) of the Board's Regulation Y (12 CFR 222.7(a)), was held before a duly selected Hearing Examiner; proposed findings of fact and conclusions of law were submitted by the parties; and the Hearing Examiner filed a Report and Recommended Decision wherein denial of the application was recommended. Applicant submitted exceptions, with supporting brief, to the said Report and Recommended Decision, and Protestants filed a reply to the exceptions.

Having considered all matters properly before the Board in this proceeding,

IT IS HEREBY ORDERED, for the reasons set forth in the Board's Statement of this date, that the said application be and hereby is denied.

Dated at Washington, D. C., this 6th day of May, 1963.

By order of the Board of Governors.

Voting for this action: Chairman Martin, and Governors Balderston, Mills, Robertson, Shepardson, and Mitchell.

Absent and not voting: Governor King.

(Signed) MERRITT SHERMAN
Merritt Sherman,
Secretary.

(SEAL)

BOARD OF GOVERNORS

OF THE

FEDERAL RESERVE SYSTEM

Application of Trans-Nebraska Co., Lincoln, Nebraska, for Permission to Become a Bank Holding Company By Acquiring More Than 50 Per Cent of the Outstanding Common Stock of the Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska

STATEMENT

Trans-Nebraska Co. ("Applicant"), Lincoln, Nebraska, filed an application, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 ("the Act"), for permission to become a bank holding company by acquiring more than 50 per cent of the outstanding common stock of The Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

Background.—Following the filing of the application and pursuant to requirement of the Act, *views on the application were requested of the Comptroller of the Currency* and the Director of Banking for the State of Nebraska. Notice of receipt of the application was also transmitted to the United States Department of Justice and was published in the Federal Register on May 18, 1962 (27 F.R. 4748). *By letter dated July 3, 1962, the Comptroller recommended that the application be approved.* The State Director of Banking, by letter of June 11, 1962, also recommended approval; however, on September 26, 1962, he advised the Board that the results of a poll of bankers in the State by the Nebraska Bankers Association indicated substantial opposition to bank holding companies, and stated that—

> "Had I had this information before me at the time that I was considering the . . . application, I would, of course, not have recommended that your Board act favorably upon the application, as I feel that this is a problem for the bankers to decide and not for the Director of Banking."

A number of requests were received by the Board from bankers in Nebraska for a public hearing on the application, and because of the interest manifested in the proposal the Board concluded that, although not required by law, the public interest would be served by scheduling such a proceeding. The hearing, notice of which was published in the Federal Register of August 17, 1962 (27 F.R. 8233), was held in Omaha, Nebraska, on October 2-5, 1962, before Hearing Examiner David London, who was selected for such purpose by the United States Civil Service Commission pursuant to section 11 of the Administrative Procedure Act (5 U.S.C. 1010). . . .

On the basis of the factual record made at the hearing, including the Hearing Examiner's report and the pleadings described above presenting argument based upon the hear-

ing record, the Board has reached the decision hereinafter indicated.

Statutory factors.—Section 3(c) of the Act requires the Board to take into consideration the following five factors: (1) the financial history and condition of the holding company and banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether the effect of the acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. . . .

Financial history and condition.—Since Applicant is a proposed new corporate structure, the formal organization of which has been held in abeyance pending the Board's decision on the instant application, it has no financial history. The holding company's financial condition following organization would be satisfactory, assuming effectuation of the organizational plan as set forth in the application.

So far as concerns the banks involved, the Hearing Examiner found their financial history and condition to be satisfactory. The Board concurs.

Prospects.—With respect to the proposed subsidiary banks, the Hearing Examiner found as follows:

> "The record . . . establishes that the future prospects of the three banks involved are, by and large, intimately related to the economy of the regions in which they are located. The economies of Crawford and Harrison, while by no means dynamic, appear to be stable, and the economy of the Martell area, being located near the State Capital, gives indications of growth, albeit not aggressive. Accordingly, it is concluded, and Protestants concede, that the future prospects of the three banks involved are not unfavorable, and this would be true whether or not they were to become affiliated with the proposed holding company sysfem."

The Board concurs.

The Hearing Examiner found, and the Board concurs, that since Applicant's assets would consist principally of the stock of the three proposed subsidiary banks, its prospects, from the standpoint of profitable operations may reasonably be regarded as paralleling those of the banks in question and, therefore, also may be adjudged as not unfavorable.

The Board notes, however, that the growth prospects of the three proposed subsidiary banks, and hence their potential for more profitable operations in the future, are limited because of the economies of the geographical areas in which they are located. This fact is recognized by Applicant both in the application and in the testimony of its witnesses at the public hearing. Accordingly, it would appear that Applicant's prospects for enhancing the profitability of its operations would be contingent largely upon the addition of additional banks to the holding company system. *In this regard, however, the Board also notes that on March 12, 1963, the Governor of the State of Nebraska signed into law a bill which, completely apart from the question of its effect on Applicant's proposed organization, would in any event appear to prohibit further acquisition of banks by holding companies in the State. The Board is of the opinion that this development would further limit Applicant's prospects....*

Convenience, needs, and welfare.—The Hearing Examiner concluded that—

> "Consideration of the entire record compels the conclusion that establishment of the proposed holding company would not have a significantly favorable effect upon the convenience, needs, or welfare of the communities or areas concerned."

The Board concurs.

Effect of proposer acquisition on adequate and sound banking, public interest, and banking competition.—The

Hearing Examiner found that, so far as the size or extent of the proposed holding company system is concerned, its formation would not be inconsistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. The Hearing Examiner went on to state, however, that—

> "... it is manifest from the legislative history of the Act that the thread of public interest runs throughout the various statutory criteria which must be considered, and I have serious reservations regarding the compatibility of my findings regarding the management and capital structure of the proposed holding company with the public interest." [Footnote omitted]

The Board does not share the Hearing Examiner's reservations regarding the management of the proposed holding company nor his concern about the lack of an anticipatory firm underwriting commitment insofar as concerns the company's program for financing its acquisition of the Crawford and Sioux National banks. However, as pointed out by the Hearing Examiner, the legislative history of the Act shows a pervading concern on the part of the Congress that the "public interest" be given a prominent position in the Board's evaluation of applications under the Act, and the Board is of the opinion that there are features of the proposed method of financing which would be contrary to the public interest....

This latter circumstance might not be objectionable were the holding company to have dynamic prospects for growth and expansion, either through growth of the subsidiary banks or through possible acquisition of additional banks, since such prospects might reasonably be expected to present a favorable climate for enhanced earning potential and capital appreciation of the public's investment in the holding company stock. However, such is not the case here. The proposed subsidiary banks are all small and their growth pattern has been slow and sporadic, with the possibility of a more favorable trend in the furture conceded

by Applicant to be quite limited. *Furthermore, in all likelihood legislation recently enacted by the State of Nebraska would prevent further expansion of Applicant's system through acquisition of additional banks (if, indeed, it would permit Applicant to consummate even its initial plans).*

Accordingly, the Board is faced with a situation where, for all practical purposes, the holding company involved apparently would be frozen in its present posture with the chances of any significant enhancement of earnings on, or capital appreciation of, its stock speculative at best. This being the case, the Board does not feel that the proposal embodied in the application would be in the public interest in terms of what the public investors could expect to receive, either initially or in the future, in return for their investment.

It should be emphasized that the Board is not questioning the integrity, character, or good faith of the organizers of the proposed holding company. *However, for the reasons stated it is believed that consummation of the proposed arrangement would be adverse to the interests of the potential investors, and consequently adverse to the public interest.*

Accordingly, under the circumstances presented in this case, it is the judgment of the Board that the application should be denied.

May 6, 1963.